

**U.S. Army Corps of Engineers, Seattle District**  
**Requirements of Nationwide Permit General Condition 18**  
**for Endangered Species for Non-Federal Permit Applicants**

10/16/15

**Introduction:** The purpose of this document is to provide information to permit applicants that are not federal agencies to help them determine whether a proposed Nationwide Permit (NWP) activity requires submittal of a permit application (also known as a pre-construction notification or PCN nationally and specifically in the Seattle District known as a Joint Aquatic Resource Permit Application (JARPA)) in regards to Endangered Species Act, Section 7 (ESA) requirements.

There are two key situations that require the submittal of a PCN:

1. when required specifically by the terms and conditions of the NWP; and
2. when required by regional general conditions for the NWPs.

For the 2012 NWPs, ESA compliance is discussed in NWP General Condition 18 (full text in Appendix A of this document). Paragraph (c) of NWP General Condition 18 requires a non-federal user of an NWP to submit a PCN to the appropriate Corps District office if “any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat.”

All PCNs are reviewed by Corps staff and evaluated for potential effects to listed species and critical habitat under the ESA. Paragraph (c) of NWP General Condition 18 states that the permit applicant cannot begin the NWP activity until he or she has been notified by the Corps that the proposed activity “will have ‘no effect’ on listed species or critical habitat, or until [Endangered Species Act] Section 7 consultation has been completed” if the Corps makes a “may affect” determination for the proposed NWP activity.

In Appendix B of this document are definitions which may assist permittees in determining whether their proposed NWP activities might affect listed species or critical habitat. For proposed NWP activities, if an ESA listed species is in the vicinity of the proposed project, the applicant must submit a PCN to the Corps district office, so that the Corps can evaluate the impacts of the proposed activity and determine whether ESA consultation is required.

In Appendix C of this document are links to the websites of the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (also known as NOAA Fisheries)(collectively called the “Services”. These websites contain information about the listed species and critical habitat under the jurisdiction of the USFWS and NMFS in the vicinity of your proposed project.

If your project is located in areas inhabited by listed species, within designated critical habitat for those species, or in the vicinity of these areas, a PCN is required. The information required for a PCN is listed in paragraph (b) of NWP General Condition 31.

Additional information required for PCNs within Seattle District is specified in the District's [2012 NWP User's Guide](#) and clearly identified under each specific NWP text within a shaded box.

The Corps will notify you within 45 days of receipt of a completed PCN whether formal or informal ESA consultation needs to be conducted for the proposed NWP activity. You may need to submit a biological evaluation or biological assessment that evaluates the impacts of your proposed project on ESA-listed species and critical habitat. You are not authorized by a NWP and cannot conduct the NWP activity until notified by the Corps that the proposed NWP activity will have "no effect" on listed species or critical habitat or the ESA consultation has been completed.

Washington State contains numerous ESA-listed species. A PCN is required for most projects. Please read the text of the NWP(s) you think your proposed activity may qualify for. In the Seattle District, regional conditions have been added to the NWPs to require notification PCN for additional activities particularly bank stabilization and stream crossings. Please review those regional conditions, which are available at: [www.nws.usace.army.mil/Missions/CivilWorks/Regulatory.aspx](http://www.nws.usace.army.mil/Missions/CivilWorks/Regulatory.aspx), scroll down to "Most Requested" and select [2012 NWP User's Guide](#). Please see Appendix D of this document for a flow chart which provides guidance on determining when a PCN should be submitted for a proposed NWP activity to comply with NWP General Condition 18 and other general and regional conditions. If you are uncertain about whether a PCN should be submitted for a particular NWP activity to comply with NWP General Condition 18, or if you have any questions regarding the information in this document, you should contact the county Project Manager listed on our website at [www.nws.usace.army.mil/Missions/CivilWorks/Regulatory.aspx](http://www.nws.usace.army.mil/Missions/CivilWorks/Regulatory.aspx), go to "Quick Links" and select "Contact Us" and select "Project Manager Assignments and Contact Information".

## **Appendix A: Text of Nationwide Permit General Condition 18**

**18. Endangered Species.** (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which “may affect” a listed species or critical habitat, unless Section 7 consultation addressing the effects of the proposed activity has been completed.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will review the documentation and determine whether it is sufficient to address ESA compliance for the NWP activity, or whether additional ESA consultation is necessary.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed work or that utilize the designated critical habitat that might be affected by the proposed work. The district engineer will determine whether the proposed activity “may affect” or will have “no effect” to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps’ determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the project, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have “no effect” on listed species or critical habitat, or until Section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific regional endangered species conditions to the NWPs.

(e) Authorization of an activity by a NWP does not authorize the “take” of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with “incidental take” provisions, etc.) from the U.S. FWS or the NMFS, The Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word “harm” in the definition of “take” means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or

injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. FWS and NMFS or their world wide web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.noaa.gov/fisheries.html> respectively.

## Appendix B: Definitions

*Action* means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. [50 CFR 402.02]

Explanatory note – For the purposes of the NWP Program, the action is generally the activity that is authorized by one or more NWPs (item (c)). Those activities are: discharges of dredged or fill material into waters of the United States regulated under Section 404 of the Clean Water Act and structures or work in navigable waters of the United States regulated under Section 10 of the Rivers and Harbors Act of 1899.

*Action area* means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action. [50 CFR 402.02]

Explanatory note – When a Corps district receives a PCN for a proposed NWP activity, it will identify the action area if it determines the proposed NWP activity may affect listed species or designated critical habitat and therefore requires ESA Section 7 consultation.

*Effects of the action* refers to the direct and indirect effects of a proposed action on listed species or critical habitat. [50 CFR 402.02]

*Direct effect* means the direct or immediate effects of the proposed action on a listed species or its habitat. [Services' 1998 Section 7 Consultation Handbook, page 4-25.]

*Indirect effect* means effects that are caused by the proposed action and are later in time, but still are reasonably certain to occur. [50 CFR 402.02]

Explanatory note – For the purposes of determining whether a PCN is required because a proposed NWP activity might affect listed species or critical habitat, non-federal applicants should submit a PCN when the proposed activity is located within or in the vicinity of any of the areas inhabited by the species listed above or in designated critical habitat for those species, regardless of the lack of any specific requirements in the individual NWPs or in the regional conditions for the NWPs. As described in NWP General Condition 18, paragraph (c), proposed activities in occupied habitats, within designated critical habitat, or in the vicinity of these areas “might affect” listed species. The Corps district will evaluate that PCN and make an effect determination to decide whether ESA Section 7 consultation is required. The Corps district will notify the applicant of its determination, and if ESA Section 7 consultation is required, then the activity is not authorized by NWP until that consultation is completed.

*Destruction of adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. [50 CFR 402.02]

Explanatory note – Under NWP General Condition 18, pre-construction notification is required for any NWP activity that: (a) might affect designated critical habitat, (b) is in the vicinity of designated critical habitat, or (c) is located in critical habitat. The Corps district will evaluate the PCN to determine if the proposed NWP may affect designated critical habitat, and will conduct ESA Section 7 consultation if it makes a “may affect” determination. The Corps district will notify the applicant of its determination, and if ESA section 7 consultation is required, then the activity is not authorized by NWP until that consultation is completed.

*No effect* means the proposed action will not directly or indirectly affect listed species or destroy/adversely modify designated critical habitat.

Explanatory note – There has to be no potential for an NWP activity to affect listed species or critical habitat to be considered no effect. For example, an NWP activity and all of its components would have to be located outside of the range and designated critical habitat of listed species, beyond the distance where an indirect effect might occur to listed species or designated critical habitat.

## **Appendix C: Listed species and critical habitat in Washington State**

There are two Federal agencies that administer the Endangered Species Act: the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS)(also known as NOAA Fisheries). The USFWS manages land and freshwater species. The NMFS manages anadromous fish and marine species.

For USFWS, the Environmental Conservation Online System (ECOS) contains a variety of reports related to USFWS threatened and endangered species. Also on the page is a link to the Information for Planning and Conservation (IPaC) tool. This tool can be used to identify your project location and receive an official USFWS species list (pursuant to 50 CFR 402.12) that should be used in evaluating the potential impacts of a project: [www.ecos.fws.gov](http://www.ecos.fws.gov)

The Washington Fish and Wildlife Office website contains endangered species and Section 7 consultation information: [www.fws.gov/wafwo](http://www.fws.gov/wafwo)

The NOAA Fisheries West Coast Region website contains information about threatened and endangered species, and their critical habitat, managed by the NMFS in Washington State: [www.westcoast.fisheries.noaa.gov](http://www.westcoast.fisheries.noaa.gov)

## Appendix D: Pre-Construction Notification Determination Flow Chart

